

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,)
4)
5 Plaintiff,) No. CR 07-410RAJ
6)
7 v.) Seattle, Washington
8)
9 BEVERLEE KAMERLING, et al.,)
10)
11 Defendants.)
12)

13 BEFORE THE HONORABLE RICHARD A. JONES, DISTRICT JUDGE

14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 APRIL 11, 2008

16 (see next page for appearances)

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ANGELO CALFO

For Defendant Nick Alexander: JIM HENDERSON

For Defendant John Worthen: HOWARD RATNER

For Defendant Seth Quinto: WILLIAM HINES
NICHOLAS PINTO

For Defendant Joel Ramsden: JOHN POLLOK
JEFF HOFFMAN

For Defendant Don Goldstein: HERBERT COHEN

For Defendant Jamie Goldstein: ROBERT GOLDSMITH

For Defendant John Johansen: RALPH HURVITZ

1 SEATTLE, WASHINGTON FRIDAY, APRIL 11, 2008

2 HON. RICHARD A. JONES, DISTRICT JUDGE 9:20 A.M.

3 PROCEEDINGS:

4 THE CLERK: This is the matter of the United States
5 of America versus Beverly Kamerling, et al., cause number
6 CR07-410 assigned to this court.

7 Counsel please rise and make your appearances for the
8 record.

9 MR. LORD: Good morning, Your Honor. Jim Lord for
10 the United States.

11 THE COURT: Good morning.

12 MR. TENPENNY: Good morning, Your Honor. Lyle
13 Tenpenny and Angelo Calfo for Miss Kamerling.

14 MR. HENDERSON: Good morning, Your Honor. Jim
15 Henderson for Nick Alexander.

16 MR. RATNER: Good morning, Your Honor. Howard Ratner
17 for John Worthen.

18 MR. HINES: Good morning, Your Honor. Bill Hines --

19 MALE VOICE ON SPEAKERPHONE: Good morning, Your
20 Honor. John Pollok and Jeff Hoffman for the defendant Joel
21 Ramsden, who is present with us in our office.

22 THE COURT: Good morning.

23 MALE VOICE ON SPEAKERPHONE: Good morning, Your
24 Honor. Judge, Herbert Cohen in Fort Lauderdale, Florida on
25 behalf of Don Goldstein who is on the line at his home.

1 THE COURT: Thank you.

2 MALE VOICE ON SPEAKERPHONE: Good morning, Judge.
3 Nicholas Pinto for Seth Quinto. I'm in New York; Mr. Quinto is
4 on the line in his home.

5 THE COURT: Good morning to you as well.

6 MALE VOICE ON SPEAKERPHONE: Good morning, sir.

7 THE COURT: Now, counsel.

8 MR. HINES: Bill Hines, local counsel for Seth
9 Quinto.

10 THE COURT: Thank you.

11 MR. GOLDSMITH: Robert Goldsmith for Jamie Goldstein,
12 who I presume is on the line.

13 THE COURT: Good morning.

14 Mr. Goldstein, you're on the line?

15 MALE VOICE ON SPEAKERPHONE: Yes, sir.

16 THE COURT: Good morning to you, sir.

17 MR. HURVITZ: Good morning, Your Honor. Ralph
18 Hurvitz, local counsel for John Johansen.

19 I understand Mr. Johansen is on the line.

20 THE COURT: Mr. Johansen, you on the line as well?

21 MALE VOICE ON SPEAKERPHONE: Yes, Your Honor.

22 THE COURT: Thank you. Is there anyone else that
23 needs to be introduced at this time? There appears not to be
24 so.

25 We are here for a status conference this morning. I

1 have received two motions. The Court will get to both of those
2 motions, but I'm going to take those matters up at the end
3 because they may not relate to some of the other counsel. And
4 parties may choose to leave or not participate; that will be
5 their call. But I want to take those up at the end.

6 First is my understanding is that there has been a
7 Rule 20 consent to transfer on the matter of John Johansen, and
8 let's address that first. Has that taken place?

9 MR. HURVITZ: The transfer is -- oh, I'm sorry.
10 Ralph Hurvitz on the record, Your Honor.

11 I spoke last night with Mr. Futerfas, who's the
12 attorney for Mr. Johansen. My understanding is that plea has
13 not yet been entered, and I don't believe a date has been
14 scheduled yet for the entry of the plea.

15 THE COURT: Mr. Lord, do you have any different
16 information?

17 MR. LORD: No. I was just going to indicate it's my
18 understanding that the file has in fact been transferred to the
19 Eastern District of New York but, as Mr. Hurvitz indicated, the
20 plea has not yet been entered.

21 THE COURT: At this point, then, until that's
22 actually taken place, we will operate under the assumption that
23 Mr. Johansen's still within this court's jurisdiction and will
24 be required to participate in the conferences.

25 Now, at this point before we get to the other

1 motions, it's open now for any matters that need to be brought
2 to the Court's attention. That's the reason we're having these
3 status conferences. I have not been advised of any specific
4 issues that need to be addressed, but the thing is I want to
5 make sure there aren't any outstanding discovery issues. If
6 there are, I want to know about them now.

7 I like to know if there's any issue regarding the
8 opportunity to access witnesses, if there's any issue as far as
9 disclosures of any expert witnesses in this case, and any
10 general issues that this court can provide any degree of
11 assistance in any regard.

12 Counsel for the government, why don't we start with
13 you?

14 MR. LORD: I'll just report to the Court that we
15 complied with our discovery obligations as set forth in the
16 Court's scheduling order and all of that discovery has been
17 produced, and we've provided all defense with a copy of -- with
18 a letter setting forth who our potential expert witnesses are
19 in the case as required by the order.

20 THE COURT: Have you been advised of any specific
21 issues or concerns regarding the ability to review any material
22 because of the possible degradation of files because of the
23 number of times they've been copied or access to the documents
24 that you have available or the volume of information that you
25 have available?

1 MR. LORD: No, Your Honor.

2 THE COURT: Are you aware of any issues that need to
3 be addressed as far as the government is concerned?

4 MR. LORD: No, Your Honor.

5 THE COURT: Counsel, any issues that you want to
6 bring to the Court's attention at any level in any regard?

7 MALE VOICE ON SPEAKERPHONE: Judge, John Pollok in
8 New York.

9 We received from the government timely, of course, a
10 hard drive of -- with respect to certain discovery material.
11 We are unable at this point to download it, so we need some
12 technical information from the government as to the nature of
13 the software that is needed to download.

14 THE COURT: Have you been in contact with the
15 government to even inquire?

16 MALE VOICE ON SPEAKERPHONE: Yes, Your Honor.

17 THE COURT: Have they resisted --

18 MALE VOICE ON SPEAKERPHONE: Not yet, because
19 apparently the individual who's responsible for it is not in
20 the office today, so they couldn't -- we got it yesterday and
21 we inquired this morning.

22 THE COURT: Does that present a problem, Mr. Lord?

23 MR. LORD: No, Your Honor.

24 Just so the Court's aware, the reason they got it
25 yesterday is they didn't provide us with the hard drive until

1 after March 31st; so as soon as we got it we did the
2 downloading, got it back to them promptly as soon as that was
3 completed.

4 And there was a phone call placed to my office that
5 my legal assistant picked up about ten minutes before court
6 from Mr. Pollok's office suggesting there may be a problem with
7 accessing the software -- I mean the data that we had produced.
8 That's the first I've heard of it. I asked my legal assistant
9 to call their office back and to report to them that after this
10 hearing we would put them in contact with the technical person
11 at the FBI who actually did the downloading so that they can
12 figure out how to access it.

13 THE COURT: Mr. Pollok, it appears that that will
14 address your specific concern. Do you agree, counsel?

15 MALE VOICE ON SPEAKERPHONE: Yes, absolutely. The
16 reason is we got it yesterday because the hard drive that we
17 originally sent was too small so we sent a new one. There's no
18 problem. We just need to figure out how to do it.

19 THE COURT: All right.

20 MALE VOICE ON SPEAKERPHONE: And we will talk to the
21 appropriate FBI agent on Monday, I guess.

22 THE COURT: Other counsel have specific issues to
23 bring to the Court's attention other than the motions which
24 were noted?

25 MR. TENPENNY: Just briefly, Your Honor. We did

1 receive the government's electronic production --

2 MALE VOICE ON SPEAKERPHONE: Who's this talking,
3 please?

4 MR. TENPENNY: I'm sorry. This is Lyle Tenpenny for
5 Miss Kamerling.

6 We did receive the government's production. We're
7 still, you know, in the process of downloading it into our --
8 you know, into our, you know, document software and reviewing
9 it. It's quite voluminous. There are 1200 gigabytes of
10 material we're going to review, so I just would note that we
11 are in the process of reviewing it. The government did submit
12 it by March 31st, and we reserve the right to raise any issues
13 with respect to that production at a later time.

14 THE COURT: All right. Anyone else has any specific
15 issues, then let's now deal with the actual motions which were
16 presented to this court. The Court has received defendant
17 Kamerling's motion to strike certain conditions of release and
18 defendant Nicholas Alexander's second motion to modify
19 conditions. This is a defense motion, so let's start first
20 with Miss Kamerling's motion to strike certain conditions of
21 release.

22 Counsel, you wish to address the Court at this time?

23 Now, before we address these matters, these status
24 conferences are giving the parties the opportunity to address
25 or raise any specific questions that you have. If you

1 collectively know that there's no need for the status
2 conference, please let the court clerk know. I don't want to
3 bring you here unnecessarily. Second -- but I do want to give
4 you the opportunity to come here and deal with any specific
5 problems, and that's the purpose of these. So if we don't need
6 these, let me know. I'm certainly not going to waste anybody's
7 time.

8 If you don't want to participate in the remaining two
9 matters before this court, you're certainly free to leave as
10 well. If you want to stay here out of curiosity, that's your
11 call.

12 MR. CALFO: If I may, Your Honor.

13 THE COURT: You may.

14 MALE VOICE ON SPEAKERPHONE: Judge, this is John
15 Pollok again in New York, and, while this has not been raised
16 before, it does raise the hackles on the back of my neck.

17 The discovery that we got is vast, as Mr. Tenpenny
18 has indicated. Ours is not quite as large as theirs, but it's
19 in excess of 750 gigabytes. I know Mr. Lord has represented to
20 the Court that the trial will be of a certain duration.
21 However, based on the discovery I begin to wonder whether or
22 not he wishes to reassess that and advise the Court that the
23 trial may be of significantly longer duration than he
24 originally estimated. We think it will.

25 THE COURT: Okay. Well, at this point in time,

1 counsel, we met or addressed that question the last time
2 everyone was here, and the Court believes, other than the fact
3 that discovery has been provided, there's no specific basis
4 presented other than sheer volume to support your or anyone
5 else's claim for further delay or the extent of time for the
6 trial. So at this point in time we'll leave the trial
7 suggestion as indicated --

8 MALE VOICE ON SPEAKERPHONE: Judge, I just wanted to
9 make the Court aware that -- as to the quantity of discovery.
10 I wasn't making any motion at this point.

11 THE COURT: Okay. I appreciate that, counsel. And
12 I've gotten two different quotes in terms of the volume. One
13 lawyer says it's seven gigabytes and someone else --

14 MALE VOICE ON SPEAKERPHONE: 750. 750 gigabytes.

15 THE COURT: Okay. Well, somewhere in between those
16 two. Thank you, counsel.

17 MR. CALFO: Your Honor, just on the issue of status
18 conferences and before other people may leave, I, for one,
19 think the status conferences are a good idea to have. Now,
20 perhaps today we didn't have any specific issues to bring to
21 the Court. That wasn't necessarily clear --

22 MALE VOICE ON SPEAKERPHONE: If someone's talking, I
23 can't hear.

24 THE COURT: Counsel, why don't you step up to the
25 lectern.

1 MALE VOICE ON SPEAKERPHONE: Thank you, Judge.

2 THE COURT: And for the future, since we do have
3 participants by the phone, let's always step to the lectern and
4 always identify yourself before you speak.

5 MR. CALFO: Yes, Your Honor. It's Angelo Calfo on
6 behalf of Miss Kamerling.

7 Just with respect to the status conferences, as I
8 said I think these conferences are a good idea. I'd like to
9 see the Court schedule another one, if it would, for six weeks
10 out or so. Before everyone leaves I thought it might be a good
11 idea to discuss dates. That's my suggestion.

12 I know today we didn't have anything, but because of
13 the, you know, voluminous nature of this discovery and the
14 likelihood that there will be some issues with respect to
15 discovery, including expert discovery, I think having another
16 date set would be a good idea.

17 THE COURT: Are there any other persons that would
18 disagree with counsel?

19 MALE VOICE ON SPEAKERPHONE: No.

20 THE COURT: Let's set a date out now. Counsel, the
21 next date that I could possibly accommodate would be -- are
22 Fridays preferable?

23 MALE VOICE ON SPEAKERPHONE: Doesn't matter.

24 MR. CALFO: Fine.

25 THE COURT: Does it make a difference for the

1 parties?

2 MR. RATNER: No.

3 MALE VOICE ON SPEAKERPHONE: No, sir.

4 MALE VOICE ON SPEAKERPHONE: No.

5 THE COURT: Counsel, how about June 13th at 1:30?

6 MALE VOICE ON SPEAKERPHONE: June 13th. Is that your
7 time, Your Honor, or --

8 THE COURT: 1:30 Pacific Standard Time.

9 MALE VOICE ON SPEAKERPHONE: Pacific Standard Time,
10 1:30?

11 THE COURT: Yes.

12 MALE VOICE ON SPEAKERPHONE: That will be 4:30 in
13 Florida and New York. June 13th, Friday.

14 THE COURT: I see no disagreement from any of the
15 parties, so the Court will set it at 1:30, June 13th, Pacific
16 Standard Time. And again, counsel, if you do not have any
17 specific issues, then we may cancel that hearing. But I want
18 to schedule it so everyone knows exactly what's taking place.

19 In that regard, any party who wishes to leave, you're
20 free do so. But those parties that do have specific motions
21 before this court, this is your opportunity to address the
22 Court.

23 So, Mr. Tenpenny, if you'd retake the stand.

24 MR. TENPENNY: Again, good morning, Your Honor. Lyle
25 Tenpenny for Miss Kamerling.

1 We had filed a motion that is directed at two of the
2 conditions of Miss Kamerling's appearance bond. The first
3 relates to the condition that is a virtually complete ban on
4 her Internet use, and we -- and the second relates to the
5 financial reporting requirement. And I'll address the Internet
6 condition first. I think that issue is more straightforward.

7 Your Honor, simply put, there's no legal or factual
8 basis for that condition. The government has not been able to
9 cite a single instance in this district when a similar Internet
10 restriction has been imposed in a case with similar facts. It
11 cited two instances in nonsexual cases in which a similar
12 Internet restriction was imposed, and those related -- those
13 were in cases where there was sophisticated computer hackers
14 who were able to infiltrate secure computer systems and wreak
15 havoc. If anything, those two examples show why the imposition
16 of that condition in this case is simply inappropriate.

17 The government hasn't cited any other district court
18 decisions that would support a condition, similar condition, or
19 a condition in a similar case. And we've cited a number of
20 circuit court decisions in the Ninth Circuit and in other
21 circuits around the country showing that circuit courts are
22 quite skeptical of broad Internet restrictions, and that
23 reflects, I think, in part that we live in the twenty-first
24 century and the Internet is such a central part of our daily
25 lives in a number of the nine ways.

1 We've cited two Ninth Circuit decisions in the last
2 year in which Ninth Circuit said categorically, we are aware of
3 no instances in which this court has approved a similar
4 Internet restriction as the one imposed in this case in
5 nonsexual cases. And there are other circuit courts from
6 around the country that have made similar statements and have
7 taken similar positions.

8 I'm aware that the -- those cases arose in the
9 supervised release context, but that doesn't mean they have no
10 application here. The standards for the supervised release
11 conditions are strikingly similar to the conditions, pre-trial
12 release conditions. Those conditions are to be narrowly drawn,
13 and they're to reflect the need for community safety. They're
14 supposed to be reasonably related to the offense.

15 And that bears a striking resemblance to 3142
16 standard, and so it simply isn't the case that those Ninth
17 Circuit decisions hold little value, as the government argues.
18 So legally simply there is no precedent for this Internet
19 restriction.

20 Factually there is no basis for it either. The
21 government spends most of its brief giving a laundry list of
22 what it thinks are its greatest hits of evidence, whether or
23 not they relate to the Internet, and at around page 9 of its
24 brief it finally comes around to saying, well, she used email.
25 And, if email use were all that were needed to justify a broad

1 Internet restriction, then it would become a standard condition
2 in any white collar case. It's hard to any imagine any white
3 collar case not having some relationship, however attenuated to
4 the Internet. People use email. People are on the Internet
5 for a number of reasons, and the government grasps for a
6 connection between this case and the Internet.

7 It bears noting that when it was arguing for
8 detention before Judge Donahue Miss Kamerling's Internet use
9 was never mentioned. It wasn't a part of its motion for
10 detention, and clearly this has been an attempt when this
11 issue's been raised to try to draw a connection between
12 Miss Kamerling and the Internet, when that relationship is
13 attenuated.

14 Miss Kamerling -- the evidence in the case would
15 suggest that phones and fax machines and U.S. mail and even
16 wires are far more at issue in the case, and the government
17 hasn't suggested she should be banned from using those devices,
18 and I think that it would be pretty clear that, if the
19 government tried to ban her from using telephones, then that
20 would be considered overreaching.

21 And I think that that analogy holds true here.
22 There's no connection -- there simply isn't a basis to say
23 that, well, she used email, certainly not, as I say, a legal
24 basis, and there's not a factual basis for saying that mere use
25 of email can support the Internet restriction. Frankly the

1 Internet and the emails that the government mentions on page 9
2 of its brief are ambiguous at best. They don't even
3 necessarily show that those emails were inappropriate.

4 So again, Your Honor, we think this issue is
5 straightforward. There's no precedent to support the
6 restriction, and this is a garden variety white collar case.
7 It can't be the case, it can't be the case that in any case
8 where there's a -- some connection to the Internet that you get
9 this kind of restriction. And that's exactly what the
10 Barsumyan court in the Ninth Circuit case -- said somewhat
11 sarcastically a mere nexus between the computers and the crime
12 doesn't mean that the defendant should be barred from anything
13 with a circuit board. And that's kind of what -- that's a
14 quote that I think applies to this case.

15 The second issue, Your Honor, relates to the
16 financial reporting requirement on her bond. We received
17 financial forms from Pre-trial Services earlier this year. We
18 looked at those forms and had a number of conversations with
19 Miss Kamerling about them, and we tried to think carefully
20 about what information could be provided on those forms without
21 raising Fifth Amendment concerns, and we submitted -- and, you
22 know, we asked for some more time to consider that issue,
23 Pre-trial Services graciously gave us that time, and in
24 February we submitted a partially completed financial
25 statement.

1 Some of the information that's requested on that form
2 does raise real Fifth Amendment concerns for Miss Kamerling.
3 But before I address those Fifth Amendment concerns I just
4 think there's an easier way to address this issue. Because
5 there are some thorny Constitutional questions with compelling
6 Miss Kamerling to provide that information.

7 And the more simple way of addressing the issue is
8 to -- simply asking is that information necessary, is it the
9 least restrictive way for Pre-trial Services to effectively
10 supervise Miss Kamerling, you know, before trial. And we don't
11 think that the information that's requested and that has yet to
12 be provided will do anything to further Pre-trial Services'
13 supervision of Miss Kamerling.

14 The information asks such questions as her tax -- you
15 know, asks for tax information and asks for securities she
16 owns, it asks for her business holdings, business associates,
17 and it's just hard to see how providing that information will
18 do anything to assure her appearance, to insure community
19 safety.

20 The information she's provided, she's provided her
21 bank account, and she's given her consent to -- for Pre-trial
22 Services to access her credit records. So Pre-trial Services
23 can at a minimum monitor whether there's new income coming in,
24 whether she's accessing -- whether she's accessing new lines of
25 credit, and that should be the issue. It's hard -- it's just

1 hard to see how her providing this other information is going
2 to put Pre-trial Services in a position to better supervise
3 her, and it certainly -- Pre-trial Services is not -- in a case
4 with such complex allegations it's hard to see how they are in
5 a position to take the information that's requested and make
6 the determination of whether she is committing a bond
7 violation.

8 THE COURT: Ask you this, counsel. Would you not
9 agree with the Court that one of the primary purposes of
10 pre-trial supervision and one of the necessary components of
11 supervision is to have some degree of appreciation or
12 understanding of how an individual supports themselves? Would
13 you agree with that basic proposition?

14 MR. TENPENNY: Yes, I would, Your Honor.

15 THE COURT: And with that, counsel, it's my
16 understanding at that this point in time Pre-trial Services has
17 no actual or effective way to have an understanding even of how
18 your client supports herself. It's my understanding that they
19 don't have or have not seen the bank statement information,
20 that Pre-trial Service does not have any credit history
21 information. They have not had any level of detail. And I
22 believe they have even attempted to try and run a credit check
23 and there's absolutely no credit history that comes up about
24 your client.

25 So that puts Pre-trial Services in a guessing game as

1 to how your client supports herself. Could you address that
2 question of how or what information you think is appropriate to
3 be disclosed.

4 MR. TENPENNY: Well, the government already has --

5 THE COURT: When you say government, we're talking
6 about two different entities. You're talking about the United
7 States Attorney's Office and we are talking about Pre-trial
8 Services. Two different components. Talk about what you
9 specifically provided to Pre-trial Services.

10 MR. TENPENNY: The information that's been provided,
11 you know, I can't speak to what Miss Kamerling's credit
12 history, you know, would reveal. That information's been run
13 through. I don't know the answer to that.

14 Miss Kamerling is directed not to be self-employed,
15 and she's directed not to commit any crimes on pre-trial
16 release, and Miss Kamerling is honoring those conditions of her
17 bond, and if the government -- and I say the government. I am
18 referring to the prosecution -- if the prosecution thinks that
19 there is reason to believe that she's not honoring those
20 conditions, then they can take the appropriate steps.

21 But the issue here is should Miss Kamerling be
22 required, be compelled to provide information that could be
23 used in the -- in a case against her in some form, whether for
24 sentencing or whether to develop investigative leads. And so I
25 do think we do get into the Fifth Amendment issue when

1 Pre-trial Services is saying, we want to know, we want to know
2 everything about how she's -- you know, how she lives her life.

3 Because that is what this case, you know, is very
4 much about. The government is charging that she uses --
5 alleged she uses nominees, that she has been hiding money and
6 she's not paid --

7 THE COURT: Okay. One of the parties on the
8 telephone has a child in the background. It's difficult for
9 the Court to hear what's taking place. So if you could address
10 that concern. Thank you.

11 Please continue.

12 MR. TENPENNY: I'm sorry, Your Honor. The
13 allegations in the case, there's a near complete overlap
14 between those allegations and the information that's requested,
15 and so the fact is that providing this information does place
16 Ms Kamerling at risk. I don't think there's any question about
17 that when you consider that in -- Pre-trial Services is
18 permitted to give the government the information that she
19 provides under certain circumstances, and again it shouldn't
20 be -- her providing this information shouldn't be used as an
21 investigatory shortcut. If the government believes that
22 there's continuing -- if there's a violation of her bond, it
23 can pursue the appropriate steps. It can reconvene a grand
24 jury; it can try and subpoena other business records and the
25 like.

1 But compelling her to provide this information to
2 Pre-trial Services does raise valid Fifth Amendment concerns,
3 and I do think that there's a question as to whether it's
4 really needed for purposes of insuring her appearance and the
5 community's safety.

6 So I do think there's a tension there and I do think
7 that -- I understand the Court's concerns about whether the
8 information -- and Pre-trial Services' concerns about whether
9 the information that's been provided gives a complete financial
10 picture. Miss Kamerling has endeavored to give the information
11 that she believes she can give at this point without raising
12 the Fifth Amendment issue.

13 THE COURT: What do you believe your client's
14 produced to Pre-trial Services right now, counsel?

15 MR. TENPENNY: What do --

16 THE COURT: What do you believe or what records do
17 you have of information that's actually been produced to
18 Pre-trial Services?

19 MR. TENPENNY: Well, we've identified the bank
20 account that she holds at I believe it's Bank of America, if I
21 recall, and the account number. We've given her -- again her
22 credit information for them to run that check. We've given
23 information about her assets, you know, certain personal
24 assets. I believe we've given her loan information.

25 THE COURT: When you say about personal assets, I

1 want to clarify exactly what you believe that you provided,
2 because my understanding of what actually has been produced is
3 much more restrictive than what you've represented, counsel,
4 because I understand that she's given information about her --

5 MR. TENPENNY: Personal property may be a better -- I
6 don't know if that's -- that helps, but I recall she was -- she
7 did provide information about some small personal items, you
8 know, personal assets, jewelry and the like, that she owns,
9 which was information that was requested on the form, I believe
10 some information about real estate, which the answer was that
11 there was none. I can't recall others.

12 I mean there certainly were a number of the -- much
13 of the information that was requested was implicated in the
14 Fifth Amendment issue, but we did provide -- we did provide
15 bank information and we did provide the, you know, again the
16 background for the credit check as well, which again I would
17 argue is primarily the information that Pre-trial needs.

18 THE COURT: And, counsel, you expressed concern about
19 the government, meaning the U.S. Attorney's Office, having
20 access to the information provided to Pre-trial Services. What
21 if the Court were to include a condition that would restrict
22 Pre-trial Services of making any disclosures to the United
23 States Attorney's Office or any other entity without prior
24 approval of this court? That way you'd have a complete
25 understanding and have the opportunity to come into court and

1 raise any objection to any specific information that might be
2 disclosed by Pre-trial Services to the United States Attorney's
3 Office, again predicated upon the issue that you've raised
4 before this court.

5 MR. TENPENNY: I think there's two responses. One is
6 I think Pre-trial Services -- my understanding is Pre-trial
7 Services is required to put this information into any sentence
8 report that goes to the Court, if there were to be a conviction
9 in the case, so that's -- that would not relieve that concern,
10 because that information can find its way to the Court for
11 purposes of sentencing, and the Ninth Circuit has said that
12 providing information that could be used to enhance a sentence
13 is also implicated in the Fifth Amendment.

14 THE COURT: We're not there yet, counsel.

15 MR. TENPENNY: And I'm not saying that I hope -- and
16 I hope that we're not, Your Honor. I'm simply saying that that
17 is a way that it could still place her at risk. It doesn't
18 relieve all the concerns, is my point raising that issue.

19 And I'm forgetting the other point I wanted to make
20 on that, Your Honor.

21 THE COURT: You wish to confer with counsel?

22 MR. CALFO: Your Honor, I forget plenty of things as
23 well.

24 MR. TENPENNY: I think the issue is -- the concern is
25 that Pre-trial Services -- we know that Pre-trial Services and

1 the government, you know, are frequently, you know,
2 communicating about the case. I just note that my client has
3 grave concerns about providing the information, you know, and
4 knowing that under some circumstances it could be -- it could
5 find its way to the prosecution team and could be used to
6 develop investigatory leads and for other reasons.

7 THE COURT: Okay. Thank you, counsel.

8 Counsel, if you do think what the other issue is or
9 if you can refresh Mr. Calfo's recollection, then one of you
10 can come back after I've conferred with the government.

11 MR. CALFO: Your Honor, I don't know if it would be
12 helpful. I don't want to double-team the Court.

13 THE COURT: Step up to the lectern, counsel. Again
14 identify yourself for those persons on the phone.

15 MR. CALFO: Thank you, Your Honor. Lyle and I can do
16 the job of one lawyer together.

17 THE COURT: Okay.

18 MR. CALFO: My only observation, I guess, is I --
19 once the information is released to the government, I think
20 that's where the Fifth Amendment concern arises. It's not
21 whether or not it's ultimately used, because once the
22 information has gone to a third party it's out of the control
23 of the defendant; so the Fifth Amendment issue comes into play
24 right when the information's provided, not with respect to
25 whether there are contingencies that could occur that would

1 result in the government getting it.

2 And so the real issue is whether there's a real,
3 appreciable concern about this being used against Ms Kamerling,
4 and I think in this instance there is because she's got to give
5 the information to Pre-trial, and then there are a bunch of
6 reasons that it could go to the government, some of which are
7 contingent, some of which are not. But they are required to
8 give the information at sentencing.

9 We had this same issue in Mr. Cook's recent case.
10 The information was given to Pre-trial. Judge Zilly entered an
11 order saying it wouldn't go to the government unless there was
12 a prior court order. Went into Mr. Cowan's office to have a
13 interview with Mr. Cook, and Mr. Cowan had already received all
14 the information from Pre-trial that we had been promised
15 wouldn't get to the government through the Probation Office
16 report.

17 And I'm not saying they did anything wrong. Just
18 Pre-trial did exactly what they're required to do under the
19 statute and Mr. Cowan's position was we get it and it doesn't
20 matter what the judge's order says. It's in the statute.
21 That's just one way. There's always specific ways under
22 pre-trial statutes that allow Pre-trial to give the information
23 to the government if they think there's a suspected violation
24 of the bond and the information's relevant, and there's a
25 specific application that allows the information to be used for

1 impeachment purposes in certain instances, which also raises
2 the Fifth Amendment issue.

3 So aside from that legal issue, Your Honor, also I
4 think that it would be fair, because there is a real Fifth
5 Amendment issue here and the Fifth Amendment is an issue that
6 is dealt with on a fact-by-fact basis, that if the Court were
7 to require a -- the provision of any information by
8 Ms Kamerling, it ought to look at it in camera first in light
9 of what the government's allegations are, and then specific,
10 you know, make determinations about whether or not the
11 Pre-trial Service officer needs or should have that information
12 in light of the Fifth Amendment.

13 So those are the two observations that I had, Your
14 Honor.

15 THE COURT: Thank you, counsel.

16 Let's hear from counsel representing Mr. Alexander,
17 because he also has an issue regarding the restriction on his
18 use of the Internet, and then we can have Mr. Lord address all
19 the concerns.

20 MR. HENDERSON: Thank you, Your Honor. Jim Henderson
21 for Nick Alexander.

22 THE COURT: Good morning again.

23 MR. HENDERSON: Initially, since our motions are so
24 similar, I should probably adopt the things that Mr. Tenpenny
25 has said with regard to the Internet restrictions for his

1 client, because I think they apply equally to mine. I think
2 this case probably is a pretty good example of how easy it is
3 to track computer use, which is certainly a relevant
4 consideration for Pre-trial Services supervision.

5 In response to the two motions, I notice that the
6 government cited a couple instances in this district relating
7 to sexual predator cases, and I think probably the written
8 papers have made pretty clear my position and other counsel's
9 position vis-a-vis those kind of cases where the computer was
10 used as the sword, as the actual instrumentality of committing
11 a crime, as opposed to the case here where they're merely
12 incidental, as Mr. Tenpenny said, like the telephone or the use
13 of the mails. They're incidental instrumentalities of
14 committing the crime.

15 And the restriction, according to the Ninth Circuit,
16 in those kind of instances is an overbroad one, which really
17 kicks into sort of the meat of my particular position as a
18 representative for Mr. Alexander. I'm based in Los Angeles,
19 California, as I think the Court knows, and so my ability to
20 communicate with Mr. Alexander is restricted a little bit.
21 There are literally thousands and thousands and thousands of
22 pages of material to go through here, many of which are
23 telephone conversations intercepted and in which Mr. Alexander
24 is a participant; there are emails; there are all kinds of
25 documents on which his signature is contained; there are all

1 kinds of actions of other co-defendants which he's charged in a
2 conspiracy with that need to be explained.

3 I need to be able to be in contact with Mr. Alexander
4 on a regular basis. The current restrictions where he can have
5 access to the Internet if he comes to his counsel's office in
6 downtown Seattle and is actively supervised just doesn't work.
7 I've got a small law office with a number of other clients.
8 This isn't my only matter. I get to this matter when I can.

9 With all the review I'm spending probably three to
10 five hours a day working on this, a lot of the times, at home
11 tonight I may be able to communicate with Mr. Alexander
12 anywhere from two to two dozen times a day, depending on where
13 I am, what I'm doing, and what the particular project is at the
14 time. It's unrealistic to require him to come downtown in the
15 evening when I might be reviewing something or even at my beck
16 and call during the day. I'm the one that controls how the
17 progress of the case, not Mr. Alexander. I need him to be
18 available to me.

19 Also -- and it's struck me when I recently got the
20 government's identification of the expert witnesses that it's
21 going to be using in this case -- I've got a number -- and a
22 number may be an overstatement -- I have several Internet
23 research projects that I want my client to participate in.
24 He's the one most familiar with the facts of this case from my
25 standpoint, most familiar with the facts of the procedures in

1 which he was engaged in.

2 And I want him to be able to do some Internet
3 projects research for me when I ask him to do so. As I say,
4 I've got a few of those in mind, which I know the Court doesn't
5 expect me to identify at this point because I don't want to
6 disclose where the defense is going, but these are legitimate
7 concerns of mine. I need Mr. Alexander to be available, and
8 these kind of restrictions are actively and realistically
9 hindering my ability to represent Mr. Alexander in a
10 professional and adequate manner, and I think the situation is
11 going to get worse as I get more into these materials than it
12 gets better.

13 And with that said I know Your Honor has read the
14 papers. I don't have anything to add to what I have filed
15 previously, and I thank Your Honor for hearing me.

16 THE COURT: Thank you, counsel.

17 Before I go to Mr. Lord, anything to refresh
18 counsel's memory on the initial point?

19 MR. TENPENNY: Not at this time, Your Honor.

20 THE COURT: Thank you, counsel.

21 Mr. Lord, good morning to you again, sir.

22 MR. LORD: Good morning.

23 Let me begin by briefly discussing what the law is in
24 this area. The test I think neither of us disagree on is
25 whether the combination of conditions that have been imposed by

1 Judge Donahue constitute the least restrictive conditions
2 necessary to reasonably assure the appearance of the defendants
3 as required and the safety of any other person in the
4 community.

5 Where we disagree is that it's our position that it
6 is relevant to making a determination for the Court to consider
7 the factors that are listed at Title 18 United States Code
8 Section 3142 G, which includes such things as the nature and
9 circumstances of the offense, the strength of the case, and the
10 history and characteristics of the defendant, in addition to
11 whether they use the Internet as a part, as a means to commit
12 the crimes.

13 These factors seem to apply based upon a plain
14 reading of the statute itself, not only to a determination as
15 to whether they're eligible for release under the Bail and
16 Detention Act, but also to what conditions or combinations of
17 conditions should be imposed.

18 If you take a look at 3142 B -- I mean C B -- what it
19 says there is the test that I just quoted to the Court, that
20 must be the least restrictive conditions that will assure the
21 appearance of the person and the safety of the community, but
22 then that begs the question, well, you know, what does that
23 mean.

24 And when you get to G, what G says is that judicial
25 officer shall, in determining whether there are conditions of

1 release -- and then it uses the same language -- that will
2 reasonably assure the appearance of the person as required and
3 the safety of any other person in the community -- take into
4 account the following information, which are the factors that I
5 just reviewed for the Court.

6 Also we have a difference in the significance of the
7 cases that are cited by the defendants in their briefs, all of
8 which involve the supervised release context, which in my mind
9 sets them apart as, at most, being dicta in the context of this
10 particular argument that applies not in the supervised release
11 context but, rather, in a pre-trial release context, and that
12 is because the tests are not, as Mr. Tenpenny suggested,
13 strikingly similar. I would suggest to the Court that they're
14 different.

15 And that's because in the supervised release context
16 there's a third prong that does not apply in this context,
17 which is the Court must determine whether the condition imposed
18 in the supervised release context involves no greater
19 deprivation of liberty than is reasonably necessary, and that's
20 because, as we pointed out in our brief, when you're talking
21 about supervised release you're talking about punishment,
22 unlike in the pre-trial release context. That test is not part
23 of the equation that the Court must consider here.

24 Now let me turn to the facts here. Why are these two
25 conditions that were imposed by Mr. Donahue as part of the

1 overall package of the combination of conditions necessary to
2 remain in order to secure their appearance, and primarily and
3 most importantly, to protect the community? Protection of the
4 community is well-settled in Ninth Circuit and elsewhere
5 throughout our country, that protection of the community
6 includes protecting them from economic harm or any danger,
7 potential danger of economic harm that could be posed by a
8 defendant who is released reoffending.

9 And I'm not going to, you know, repeat everything
10 that's in my brief but just to kind of summarize topically.
11 Both defendants are facing serious charges and penalties. The
12 evidence in this case is very strong, including wiretap
13 evidence. The defendant Kamerling has a history of ignoring
14 court orders and doing so through the use of aliases and
15 nominee bank accounts. The search of public databases just as
16 of the time we filed the brief shows that both defendants
17 Kamerling and Alexander are still associated with
18 publicly-traded companies. And, as it relates to the Internet
19 restriction, both defendants in connection with the offenses
20 that have been charged used the computer and the Internet to
21 commit the offenses.

22 And it's not just, you know, the situation, as
23 Mr. Tenpenny argued, of just simply using the email. It was
24 used as a means to commit the offense here, as we set forth in
25 our brief. Yes, they used the email to communicate with other

1 coconspirators, but they used it above and beyond that.

2 They used it to send drafts of documents that
3 ultimately were disclosed to the public and contained false
4 representations.

5 They used it to actually post those drafts on Pink
6 Sheets' website, which is where you have to post financial
7 disclosures statements in relation to trading stocks over the
8 Pink Sheets.

9 They used the Internet to engage in conversation in
10 investor chat rooms that were intended to promote the stocks
11 that are at issue here.

12 They used the Internet to circulate drafts of press
13 releases as well as to disseminate press releases as part of a
14 promotional campaign.

15 So the Internet was actually used here as a means or
16 instrumentality of committing the offense, not just simply as a
17 means of communicating.

18 And finally these conditions are necessary in order
19 for Pre-trial Services to be able to effectively enforce the
20 other conditions of release that were set by Judge Donahue,
21 most importantly the one relating to no self-employment. How
22 are they going to monitor that, as the Court already pointed
23 out, as it relates to the financial disclosure condition, for
24 example, if there's no disclosure allowing them to evaluate
25 what her source of income is?

1 The public database information would suggest they're
2 still associated with public companies, suggests that perhaps
3 income could be coming in from that. Well, that would violate
4 the no self-employment provision. So they have got to be able
5 to effectively monitor that, and they can't effectively monitor
6 it without these two conditions being in place as part of the
7 total package.

8 Let me focus now on the Internet condition a little
9 bit more specifically. The Internet -- it's important that the
10 Court understand this. The Internet condition imposed by Judge
11 Donahue is not a complete bar on the use of the Internet. And
12 even the supervised release cases that they discuss, in those
13 cases they were either a complete bar on the use or they were a
14 bar unless they first obtain approval from the Probation Office
15 in the context of supervised release.

16 Here that's one of the options. They could go to
17 Pre-trial Services under the bond condition as drafted, as
18 ordered by Judge Donahue, and say, can we have permission to do
19 this. And I think it's important to point out, too, to the
20 Court that these motions were filed when no attempt to even go
21 through what is permitted under the bond condition. Typically
22 what I would expect would be that they would contact Pre-trial
23 and say can we do it, and if they were permitted to do it it's
24 a nonissue. If they're not permitted to do it, we might see a
25 motion like this.

1 But this condition doesn't require it necessarily.
2 That's one way they can access the Internet, is with advance
3 approval of Pre-trial; but the other way they can access is go
4 into their local counsel's office and accessing at their office
5 under their supervision, and that condition was absent from the
6 conditions that are at issue in the cases cited by the
7 defendants that relate to the supervised release issues. So
8 those conditions were more restrictive than the condition that
9 we've got here.

10 After receiving the defendant's reply brief I
11 inquired further within our office as to whether anybody had
12 had a case where a condition had been imposed, where it was not
13 either a child pornography case or a cyber crimes case, and I
14 was able to find one such instance, which I'll cite to the
15 Court. And it was in the case of Edna Fielder [sic],
16 F-I-E-D-L-E-R, and the case number CR 08-5032 VHS.

17 And in that particular case it was a case that
18 involved conspiracy to commit mail fraud. The nexus here to
19 the use of the Internet was much less than we have here. In
20 essence what I can determine from a reading of the complaint
21 seems to be that the Internet was used solely to communicate
22 with coconspirators, not, as we have here, as a means or
23 instrumentality to commit the offense.

24 And in that case Judge Strombom imposed a condition
25 similar to the one that was imposed here but actually an even

1 more restrictive condition, because there they were only
2 permitted to use the Internet with prior approval of Pre-trial
3 Services, whereas here, as I've indicated, they can do it one
4 of two ways, either with prior approval of Pre-trial or by
5 going to their counsel's office. So there is at least a
6 precedent in our district in at least one other case, and my
7 research was not exhaustive on that point. There may be others
8 as well.

9 What are the reasons they give for having access to
10 the Internet? I suggest to the Court they're not particularly
11 compelling. Ms Kamerling's reasons are to communicate with
12 family. Well, that can be done in other ways. Check the
13 weather, read the newspaper, pay bills, and shop. None of
14 those reasons seem particularly compelling to justify taking
15 away a condition that is important to the total package to
16 insure that Pre-trial can do their job in making sure that the
17 community is protected.

18 Similarly Alexander's purported reasons don't seem to
19 outweigh the need to keep this condition in place to protect
20 society. The need he proffers to the Court, which are all
21 hypotheticals with the one exception that was argued today by
22 Mr. Henderson with respect to the need to contact his attorney
23 in California -- but the rest of them are hypotheticals because
24 he doesn't say he's at the point of doing any of this. He says
25 he may need to enroll in college; he may want to take online

1 courses. If he gets a job, he may have to use the Internet in
2 connection with that job. He may want to sell items on eBay.
3 None of those seem particularly compelling. And the last
4 reason is to contact his attorney in California, which I'll
5 address in a minute.

6 But what's important is with respect to everything
7 that Miss Kamerling wants to do, use the Internet for, and
8 everything Mr. Alexander wants to do in terms of accessing the
9 Internet, they can do. They just got to get advance approval
10 from Pre-trial Services or they got to go to their attorney's
11 office to do it.

12 And in view of the fact that Miss Kamerling's case in
13 particular, she's using her home as her office and using her
14 home computer during the course of the crimes that she's been
15 charged with to commit the crimes and using as instrumentality
16 of the crimes, it's entirely reasonable that Judge Donahue saw
17 fit to restrict that type of Internet use to doing it while at
18 the attorney's office. The other option is obtaining Pre-trial
19 Services' consent to do it from home. But, absent that, it was
20 restricted to the attorney's office.

21 Now, with respect to this issue of reaching out for
22 counsel that Mr. Alexander cites, I mean there's a reason I
23 think that our local rules say you have to have local counsel.
24 It wasn't addressed in this specific narrow context, but
25 nonetheless it was -- it's there so that local counsel is

1 available to play a role when necessary in the context of these
2 cases. So, to the extent he needs to be able to have Internet
3 access with his counsel in California, all he has to do is go
4 to Mr. Phillips' office here and stay there as long as he needs
5 to, to communicate with his attorney down in California.

6 In terms of the Internet research that he has to do,
7 he doesn't have to do that at any particular time of the day.
8 He could arrange with local counsel here, Mr. Phillips, to
9 spend the whole day doing Internet research at his office under
10 his supervision. That's permitted by the bond that's currently
11 drafted.

12 Now, if the Court nonetheless determines that that
13 condition should remain but be less restrictive, one
14 alternative, which I've proposed in the footnote in terms of
15 the language in our brief, is that the Court permit Internet
16 use only for proper and lawful purposes on a single designated
17 computer located at Miss Kamerling's residence and prohibit her
18 from accessing certain categories of websites and Internet
19 contact as to be determined by Pre-trial Services, which I
20 would presume would include such things as investor chat rooms
21 and Pink Sheets, require installation of filtering and
22 monitoring software, and allow for random searches of her
23 computer by Pre-trial Services.

24 This condition has been approved even in the
25 supervised release context. And it's important to know, even

1 in the cases cited by the defendants, the remedy there was not
2 to say you can't have any condition at all. It was to send it
3 back to the district court to make it less restrictive. Don't
4 make it so broad; make it less restrictive. And here there are
5 other cases in our district that I've pulled this language from
6 that I stuck in our footnote where that type of condition has
7 been put into place.

8 Now let me turn to the financial reporting condition.
9 It provides that they must provide Pre-trial Services with any
10 requested information regarding your financial status, income
11 sources, and investments, and sign a release of information
12 from the credit bureau if requested by Pre-trial Services --

13 THE COURT: Counsel, counsel.

14 MR. LORD: Yes.

15 THE COURT: Please start over again, go much slower
16 so the court reporter is not having flames come out of her
17 elbows.

18 MR. LORD: I will do that.

19 MALE VOICE ON SPEAKERPHONE: Excuse me, Your Honor.
20 Herb Cohen, Fort Lauderdale again.

21 Do we need to let the Court know if we're signing
22 off?

23 THE COURT: That would be appreciated, counsel.

24 MALE VOICE ON SPEAKERPHONE: Okay. This is Herb
25 Cohen. I'm going to sign off at this point. This doesn't

1 involve my client Mr. Goldstein.

2 THE COURT: Thank you, counsel.

3 MALE VOICE ON SPEAKERPHONE: Thank you for your time.

4 THE COURT: And your client's free to leave as well.

5 MALE VOICE ON SPEAKERPHONE: Thank you, Judge.

6 MALE VOICE ON SPEAKERPHONE: Your Honor, this is
7 Nicholas Pinto for Seth Quinto. We're going to sign off as
8 well.

9 THE COURT: That's fine. Thank you.

10 MALE VOICE ON SPEAKERPHONE: Thank you, Judge.

11 MR. HURVITZ: Your Honor, as long as others are
12 departing, if Mr. Jonahson would like to sign off, then he and
13 I can --

14 THE COURT: You're free to leave.

15 Mr. Johansen, you're free to disconnect as well.

16 MR. HINES: Likewise Bill Hines.

17 MALE VOICE ON SPEAKERPHONE: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. GOLDSMITH: Robert Goldsmith on behalf of Jamie
20 Goldstein. We'd like to sign off as well.

21 THE COURT: Thank you. My apologies, Mr. Lord,
22 for --

23 MR. LORD: No problem. Maybe I should get a complex.
24 They all waited to sign off until I was halfway through my
25 argument.

1 THE COURT: Don't take it personally, Mr. Lord.

2 MR. LORD: So I will slow down.

3 With respect to the financial reporting condition I
4 was starting to quote, but I'll paraphrase it. Basically got
5 to provide information regarding financial status, income
6 sources, and investments, as well as sign a release that
7 enables them to do a credit check.

8 And then, very importantly, it says, in light of the
9 allegations in the indictment here, all financial accounts must
10 be in defendant's name. How are they going to monitor that
11 condition without them first complying with the rest of that
12 provision? Let me talk about the law briefly, and then I'll
13 talk about the equities that support keeping that condition in
14 place.

15 We have a difference here on what the law says,
16 difference of opinion. I've cited two cases in our brief. The
17 Rechnitzer case and Gallion, both of which say that there is no
18 Fifth Amendment privilege that exists with respect to complying
19 with the condition that requires providing financial
20 information to Pre-trial Services, and the rationale behind
21 those decisions is that that's because Title 18 United States
22 Code Section 3153 A 3 says that that type of information is not
23 admissible on the issue of guilt in a criminal proceeding, and
24 therefore it takes away the ability for the defendant to claim
25 that there's any Fifth Amendment privilege with respect to that

1 information.

2 In the reply brief defendants cite a couple of cases
3 just for general principles that a Fifth Amendment privilege
4 exists; but I've read those cases. Neither of them are on
5 point. They don't involve a situation -- doesn't even involve
6 supervised release, let alone pre-trial release. It's in a
7 totally different context.

8 And I've also cited cases in my brief for the
9 principle, for the fact that, if disclosed, it might be able to
10 be used for impeachment purposes down the road also does not
11 give rise to a privilege.

12 So, with that background in place as to what the law
13 is, it's the government's position that it's not a violation of
14 defendant's Fifth Amendment right, even if the defendant were
15 required to disclose everything to the Court, even if the Court
16 after hearing from Pre-trial made a determination it should be
17 released to the government.

18 In addition I think it's important to note that the
19 regulations that were promulgated pursuant to the statute as
20 ordered by Congress require that Pre-trial take assent from the
21 Court prior to disclosing financial information and that the
22 Court before authorizing disclosure give due consideration to
23 any promises of confidentiality and any harm to any individual
24 that might result from disclosure.

25 And I would argue to the Court that that sufficiently

1 protects whatever rights the defendant may have in terms of
2 trying to protect confidentiality, because the Court is going
3 to have to weigh in before that information is released to the
4 government, unless -- and this is one exception -- there's a
5 provision that says if the information bears on a condition
6 that suggests a -- let me -- rather than paraphrasing, let me
7 read that one. It's actually in the statute here. It says,
8 violation of conditions of release. It's in the regulations.

9 Pre-trial Services officer shall in compliance with
10 18 USC Section 3145 5 inform the judicial officer and the
11 United States Attorney's Office of all apparent violations of
12 pre-trial release conditions, unless the person is released
13 under supervision.

14 So they are obligated to inform us directly of
15 violations. But in terms of disclosure of the details of
16 financial information that's provided, that's only after a
17 court order or after court review and court permission is
18 obtained by the Pre-trial Services officer.

19 I actually agree with Mr. Calfo that it probably is
20 not a workable solution for the Court to add language to the
21 bond that restricts Pre-trial Services from sharing the
22 information with the government, and I think it's problematic
23 because I think that the statute does require, as Mr. Calfo
24 pointed out, that Pre-trial Services share the information
25 under certain circumstances and with certain restrictions in

1 place. And an attempt by the Court to limit that could run
2 afoul of their obligations under the statute.

3 So my suggestion to the Court is the provision remain
4 as is and that, if the Court wants to exercise more supervision
5 over it, it can certainly do so. They're obligated to come to
6 the Court anyway to obtain permission before any such
7 information is released.

8 THE COURT: Thank you, counsel.

9 Miss Smith, good morning. Please do. Please step to
10 the lectern. Please identify yourself.

11 THE COURT: Good morning again.

12 MISS CONNIE SMITH: Good morning, Your Honor. Connie
13 Smith with U.S. Pre-trial Services.

14 Your Honor, if I can just briefly address Mr. Calfo's
15 comments regarding the Wade Cook case, I won't labor that point
16 but I do want to address that there was not inappropriate
17 release of information by Pre-trial Services.

18 I'm intimately familiar with the Wade Cook case. The
19 information obtained by U.S. Probation regarding the
20 defendant's finances is independently gathered by U.S.
21 Probation. Pre-trial officer in no way would defy a court's
22 order and release that information to U.S. Probation. And I
23 can attest to that, Your Honor.

24 Also in my opinion the U.S. Attorney's Office has
25 probably a lot of frustration with this deputy of Pre-trial

1 Services, and I have a very, very conservative position on
2 releasing any information, and I am very strict about the
3 statute and any ex parte communications.

4 The statute states that its released for limited law
5 enforcement purposes. It's extremely limited, Your Honor, and
6 as the deputy of the agency I always approach the judicial
7 officer in order to protect the statute of maintaining a candid
8 and truthful relationship between the Pre-trial officer and the
9 defendant so that the Court can have the most verified,
10 informed amount of information that they need to proceed as a
11 judicial officer.

12 I do have alternative conditions, if the Court is
13 interested in hearing those in the future.

14 THE COURT: Okay. Thank you.

15 Counsel, unless there's something to add or to
16 supplement the answer you previously gave to the Court, the
17 Court's prepared to make its determinations at this time.

18 Mr. Tenpenny.

19 MR. TENPENNY: Yes. Briefly, Your Honor.

20 Just to address a couple of the specific points that
21 the government has made, first of all the standard that the --
22 that applies to these bond conditions, the government itself,
23 as noted on page 11 of its opposition brief that the 31 --
24 essentially admitted the 3142 G factors didn't apply when it
25 said that the only factors applicable to the pre-trial release

1 context are those set out in the 3142 C 1 B part of the
2 statute.

3 And, Your Honor, the government says that, you know,
4 basically that the Internet restriction isn't nearly as
5 restrictive as those in the other cases and makes a point of
6 that. The other -- the other bond condition -- the bond
7 conditions or, I should say -- excuse me -- the supervised
8 release conditions in the Ninth Circuit decisions bear a
9 striking resemblance, and the small dispensations that are
10 given my client that she can access the Internet if she gets
11 prior approval or if I'm standing over her in our office, that
12 simply isn't enough.

13 I mean the fact is I don't have to -- she doesn't
14 have to get advance approval when she uses the phone or when
15 she drops a letter in the mail and when she, you know, sends a
16 fax to my office. I don't have to be aware of those phone
17 calls or faxes, nor is Pre-trial Services, nor should Pre-trial
18 Services have to approve anytime she wants to send an email to
19 whomever she wants.

20 The other points -- I didn't say in the brief that
21 Miss Kamerling only wanted to be able to read the newspaper and
22 check the weather forecast. I made the point that there are
23 countless benign reasons we all use the Internet, including
24 those. Miss Kamerling primarily wants to help us prepare for
25 this trial and, as co-counsel pointed out, there are thousands

1 of electronic images that I can be able to send her, she can
2 review; we can communicate much more efficiently and
3 effectively. She can research the government's case, research,
4 you know -- conduct a review of the government's discovery, all
5 of which is in electronic format. There's a number of reasons
6 that she needs Internet access that pertain directly to this
7 case.

8 On the issue of the financial statements, the Fifth
9 Amendment is broad. The Fifth Amendment applies to any
10 information that places -- compelling information that places a
11 defendant at risk. As Mr. Calfo pointed out, there is concern
12 about providing this information to Pre-trial Services, a third
13 party, and when that information is released she loses -- she
14 does lose some control over whether that information goes to
15 the government, and -- however -- however conservative
16 Pre-trial Services may be on the release of that information,
17 as to some of the information they have no discretion about
18 whether the information is submitted to the Court, and it
19 can -- and if it believes, not even if it -- if it believes
20 there's a violation, it can ask the Court to release that
21 information, the information she's provided, to the prosecution
22 team.

23 So it's cold comfort in this context that there's --
24 that there may be some controls before the information is
25 released. Ms Kamerling has to fill out this information that

1 goes directly to the charges and basically hope that it doesn't
2 find its way to the prosecution team, and I don't think the
3 Fifth Amendment asks her to provide the information on a hope
4 and a prayer that it doesn't come back to hurt her.

5 Thank you, Your Honor.

6 THE COURT: Thank you, counsel.

7 MR. HENDERSON: Briefly? One minute, Your Honor?

8 THE COURT: Clock's ticking, counsel.

9 MR. HENDERSON: Listening to Mr. Lord's argument I
10 was a little bit troubled by the use of the word
11 instrumentality as the operative word in the case law. There's
12 always going to be an instrumentality, as made clear from some
13 of the previous arguments, if the mail is used or the telephone
14 is used, and the whole point of those Ninth Circuit cases is
15 that it's far more of a test than a simple instrumentality
16 test. It's whether or not the use is incidental. And in this
17 case we have use which is incidental and the computer was not
18 used, as I indicated before, as the sword or the actual
19 instrumentality from which to commit the crime.

20 I also noted that one of the things that Mr. Lord
21 indicated was that Mr. Alexander and Ms Kamerling are still
22 associated with public companies; yet the usual procedure to
23 resign or disassociate from a public company is by an Internet
24 posting, which they're precluded from doing. It just seemed to
25 strike me as another little indication of why this thing is

1 just so overly broad.

2 And it's certainly not realistic, as Mr. Lord
3 indicated, for Mr. Alexander to have to go to his local
4 counsel's office and sit there all day for anywhere from 8 to
5 16 hours a day waiting for communications from me so that we
6 can operate back and forth. You know, that doesn't work. He
7 can't be actively supervised even by local counsel if he was
8 sitting in his office at that point, and it's not, as I say,
9 realistic, and it doesn't make any sense for him to have to sit
10 there and wait for my random communications to him, which are
11 going to come at all hours in the working day and occasionally
12 after working hours.

13 I'm very concerned about, you know, that aspect of
14 the overbreadth of this order because, as I indicated
15 previously, I think this dramatically restricts my ability to
16 adequately represent my client.

17 Thank you, Your Honor.

18 THE COURT: Thank you, counsel.

19 The Court is going to make the following
20 determination after having given the parties ample opportunity
21 to make their arguments to the Court. The Court is going to
22 make modifications of the conditions of release, and the
23 Court's going to explain why I'm going to grant those requests.

24 The Court doesn't find that it's really a viable
25 alternative to require the defendants to have to go to

1 counsel's office to have to access Internet information under
2 these circumstances. One is because of the sheer volume of
3 information that the government has disclosed -- I received
4 reports from two different lawyers ranging from 12 gigabytes of
5 information to 700 -- 50 gigabytes of information -- and the
6 need to communicate and provide information back and forth. If
7 the Court were to require the defendants to go to local
8 counsel's office to be able to review or inspect that
9 information, that would necessarily tie down local counsel and
10 prevent them from having an active practice in other areas and
11 it would also create an expectation that local counsel would
12 sit there and watch the specific activities of the defendants,
13 and I'm not sure that that's realistic under the circumstances.

14 It is realistic for the defendants to contact
15 Pre-trial Services in advance if they need to go to certain
16 areas, but the Court's going to address that by the following.
17 There's a mechanism that's entitled eBlaster -- for the court
18 reporter it's E-B-L-A-S-T-E-R -- and the eBlaster is a system
19 that can monitor the software of the defendants' computers.

20 Now, it's my understanding that Ms Kamerling and
21 Mr. Alexander live in the same household. Is that a correct
22 statement, counsel?

23 MR. HENDERSON: It is.

24 THE COURT: Assuming that's correct, one, the Court's
25 going to restrict the computer use and Internet use to one

1 line, one computer in the defendants' home. This eBlaster
2 monitoring device will work as follows: First of all there are
3 three scans that are run on the specific computer. The first
4 will reveal the contents of programs on the computer; second it
5 reveals the use of mass storage devices; and the third is the
6 full analysis of the computer.

7 The specific order of the Court will require that the
8 defendant install the eBlaster monitoring software on this
9 computer and that the computer is subject to inspection by
10 Pre-trial Services to insure proper use of the computer.

11 The Court had considered giving the defendants the
12 opportunity to have a unrestricted use of the computer and then
13 allow Pre-trial Services to come in and inspect or check to see
14 what areas had been accessed but, with the capacity to erase
15 memory and erase where an individual has gone on Internet, the
16 Court doesn't believe that that's again giving Pre-trial
17 Services the opportunity to insure compliance with the statute
18 and monitor the activities as intended by this court and as
19 intended by the original order by the magistrate judge.

20 So that use of the computer will permit access to the
21 shopping, the newspaper, the weather, paying bills on line,
22 contacting family and friends, but again it's all subject to
23 monitoring by Pre-trial Services to the device that will be
24 utilized. It will also put Mr. Alexander in a position to
25 address the specific concerns that he's identified in his

1 request to this court as referenced in the attachment provided
2 to the briefing submitted to this court.

3 The Court believes that that will provide sufficient
4 access to monitoring the Internet and email information. Now,
5 the Court's also going to put a specific provision that
6 Pre-trial Services is specifically ordered not to monitor any
7 direct communication between counsel and their clients, in
8 order to preserve attorney-client communication.

9 I want to make sure that we're very clear. Counsel
10 will be directed to provide to Pre-trial Services your specific
11 email account addresses. The restriction on their ability to
12 monitor are those specific email accounts, so that means you
13 can't give your clients a host of email addresses and say it's
14 okay to communicate here. It's limited to your exact email for
15 purposes of representing your client sufficiently. That will
16 address the specific concerns that you've identified this
17 morning in court to be able to communicate with your clients
18 and to provide effective representation of your clients. It
19 also puts you in a position to be able to provide or send
20 information back to your clients.

21 Now, if you're asking for your clients to do Internet
22 research, the Court has concerns because that opens up the door
23 in terms of what fits within the rubric of Internet research
24 connected to this case. So I'm not going necessarily that far,
25 counsel, to give your client unlimited access, because that

1 will be monitored as well, if he or she is doing independent
2 research in that regard. But with the eBlaster device
3 Pre-trial Services can monitor the activities.

4 And, counsel, you need to clearly communicate if
5 those communications are attorney-client protected in the space
6 of the Internet communication. That way Pre-trial Services is
7 always on alert that they should not review or inspect the
8 nature of those communications. I believe that adequately
9 addresses the concern for monitoring of the Internet. It
10 addresses that component of the concerns.

11 Now, any other clarification needed to be provided by
12 the Court for Pre-trial Services or for the parties as it
13 relates to Internet or email use? Miss Smith.

14 CONNIE SMITH: Connie Smith again, Your Honor. If I
15 could also propose, Your Honor, adding to the modified bond
16 conditions that the defendants shall pay all fees associated to
17 eBlaster?

18 THE COURT: Yes.

19 CONNIE SMITH: Also -- I'm sorry.

20 THE COURT: My understanding, counsel, that fee is a
21 one-time fee that's under a hundred dollars and there's no
22 ongoing monthly service cost. Is that true?

23 CONNIE SMITH: That's correct.

24 THE COURT: Okay.

25 CONNIE SMITH: Also, Your Honor, that the defendants

1 shall be restricted to one identified email account. And also
2 that the defendants shall provide Pre-trial Services all email
3 addresses and Internet sites in advance, which shall be shared
4 with defense counsel and the U.S. Attorney's Office to
5 determine suitability.

6 Specific to Nicholas Alexander, Your Honor, the
7 defendant's computer use shall be limited to communicate with
8 family, friends, and for educational and employment purposes
9 only.

10 THE COURT: The Court adopts each of those, counsel,
11 as necessary for purposes of Pre-trial supervision and
12 monitoring.

13 CONNIE SMITH: Thank you, Your Honor.

14 THE COURT: And the Court finds that those
15 restrictions are least restrictive and give counsel the
16 opportunity to fully communicate with their clients and
17 addresses each of the concerns and fits still within the
18 confines of 18 USC 3142.

19 Now --

20 MR. RATNER: Your Honor, could I address one issue on
21 that by Mr. Worthen? I don't have a formal motion, but I think
22 it might be appropriate to address the Court at this time.

23 THE COURT: Briefly, counsel.

24 MR. RATNER: Thank you. This is Howard Ratner on
25 behalf of Mr. Worthen.

1 I did not make a motion for Internet access. I have
2 a similar problem as Mr. Alexander does, only perhaps more so
3 dealing with Mr. Worthen. I'm court-appointed counsel. He
4 does not have local counsel. I am the only counsel.

5 I've just sent him a hard drive containing all
6 discovery that we received from the government. I would like
7 to be able to have his input on that electronically and to
8 email him and to communicate regarding that discovery. I can't
9 do it. Just to give an example --

10 THE COURT: Counsel, are you asking for a me-too
11 motion?

12 MR. RATNER: Yes.

13 THE COURT: That puts it in a nutshell, counsel. And
14 the Court will grant the request for your client, and it should
15 equally apply to all defendants, unless there's other
16 restrictions or concerns from the other defendants.

17 Any other counsel on the line or not on the line that
18 wishes to join in the me-too motion by counsel?

19 MALE VOICE ON SPEAKERPHONE: Me, too, Your Honor.
20 Jeff Hoffman for Joel Ramsden. I'm glad we stayed on.

21 THE COURT: All right. That will be granted for your
22 client as well, counsel.

23 And, just so we can avoid having to have a separate
24 independent series of motions coming to the Court, any other
25 defendants who were not present on the line for purposes of

1 this Court's determination can make application and the Court
2 will grant the request to modify those conditions, unless
3 there's some other factual circumstances or legal reasons
4 different than what's been presented to this court.

5 Now, as it relates to the financial conditions, I'm
6 not sure that we made much progress this morning. The Court
7 still does not have any way of identifying from Miss Kamerling
8 how she supports herself. I gave counsel the opportunity to
9 clarify for the Court how Pre-trial Services can get the
10 benefit of any information of her sources of income and as
11 specifically raised by some of the points made by the
12 government, and the Court's going to require that that
13 condition still remain the same. The Court's going to require
14 that she provide the information of how she supports herself,
15 what sources of income she has at this point in time.

16 I'm not -- I have no confirmed information that
17 Pre-trial Services has actually seen the bank accounts, so that
18 information needs to be disclosed. Pre-trial Services has not
19 been able to obtain any information about her credit history.
20 We know that she's provided a name for credit history, but that
21 check to my understanding has produced absolutely no
22 information.

23 The Court does believe that it's necessary to provide
24 this information. The Court agrees with counsel for the
25 government that this court has a responsibility of addressing

1 any possible economic impact or harm that might result from any
2 other alleged illegal activities by the defendant. I believe
3 that the nature of the allegations in this particular case
4 certainly warrant the requirement that there is some
5 understanding by Pre-trial Services of the financial
6 wherewithal of the defendant, so in that regard the Court's
7 going to require that information be produced.

8 Now, I am going to add the condition that Pre-trial
9 Services is to advise this court before any disclosures are
10 made to the government of any financial information or
11 violations, so you can certainly put the government on notice
12 of any violations, which you're required to do by statute. But
13 in terms of the content or substance or specific information or
14 disclosing any information that's been produced to you by the
15 defendants, that information will require the Court's
16 involvement so the Court has an opportunity even, if necessary,
17 to do an in camera review and inspection before that
18 information is produced to the government. So this court will
19 have direct involvement before any such disclosures are made.

20 Any questions on the Court's rulings or
21 determinations?

22 MR. CALFO: I do, Your Honor. Can I speak from here?

23 THE COURT: Let's step to the lectern, counsel. I
24 think there might be some lawyers still on line that might be
25 able to hear from you that location.

1 MR. CALFO: Your Honor, I just want to make sure I
2 understand what the Court's requiring. From the Court's ruling
3 what I understood is that Ms Kamerling must provide information
4 as to how she supports herself and what the sources of her
5 current income are.

6 THE COURT: That's correct.

7 MR. CALFO: Her current bank accounts and to give the
8 Pre-trial officers credit history information. That's what I
9 wrote down, and I just want to make sure that's what the
10 understanding is as we leave today. Because those issues I
11 think actually raise far less concern to Ms Kamerling than a
12 seven-page financial statement that has been requested.

13 THE COURT: Well, I think, counsel, put it this way.
14 I don't know that we've resolved the issue today, but I think
15 if your clients provide at least that source of information it
16 will go a long way to this court making specific modifications
17 in the current condition. Pre-trial Services has given me a
18 very exhaustive list that is no different than the other list
19 that they provide to other defendants to require them to
20 provide financial information.

21 Once your client provides the information the Court
22 has specifically identified and provides information to
23 Pre-trial Services as to how she supports herself, answering
24 specifically the questions the Court has identified this
25 morning, if that doesn't satisfy Pre-trial Services' ability to

1 monitor your client's sources of income, then you can reapply
2 to this court for reconsideration or further clarification.
3 But right now produce the information, and we can revisit this
4 question at a later point in time.

5 MR. CALFO: Yes, Your Honor.

6 THE COURT: Is that satisfactory with Pre-trial
7 Services at this time?

8 CONNIE SMITH: Yes, Your Honor.

9 THE COURT: That address any concern that the
10 government has as well?

11 MR. LORD: Yes. The only modification in the last
12 statement of the Court that I would suggest is rather than
13 limiting the information that Pre-trial Services request now,
14 because the Court already indicated bond condition remains the
15 same, that they have the ability to request whatever they think
16 they need to do their job, and if for some reason the defense
17 feels a need to involve the Court again in the process it can
18 be raised again with the Court. But I think it's important
19 that Pre-trial Services be able to request whatever information
20 they need and to make any follow-up inquiries they need to make
21 to fully verify what her source of income is, whether she's
22 self-employed or not and so on and so forth.

23 THE COURT: I don't disagree with you, Mr. Lord.

24 And I don't want defense counsel to walk out of the
25 door believing that, if you provide just the items listed by

1 the Court, your job is done and that satisfies the Court's
2 concern. My understanding -- and I want to make sure you have
3 the same understanding -- is that when you provide that
4 information to Pre-trial Services, if they're not of the
5 mindset that that's enough information for them and they need
6 to make further inquiries of you or your clients, you'll need
7 to produce additional information.

8 But if that disclosure presents a further problem
9 then you can certainly come back to this court for
10 clarification and the Court can revisit the question of what
11 you produced, I can look at the quality of information you
12 provided, and then we're dealing with realistic information.
13 Because right now they don't have anything. I'm not in a
14 position to make any determination as to if it's sufficient or
15 not. But I can tell you that no information does not satisfy
16 the Court's expectation.

17 MR. CALFO: Yes, Your Honor.

18 THE COURT: Okay? Thank you.

19 MR. HENDERSON: May I, Your Honor?

20 THE COURT: Very briefly, counsel. We're in the
21 middle of a trial and have to get back to that proceeding.

22 MR. HENDERSON: This will be brief.

23 As you know, I got into the case a little later than
24 other counsel. I have the same issue of financial disclosures
25 on the table with Pre-trial Services and Miss Kamerling did.

1 I've been in contact with Kelly Neumeister about this and we
2 agreed to sort of table where we were on this until we saw what
3 Your Honor's ruling was going to be with the similar issue, so
4 I'm asking for a me-too ruling with regard to Nick Alexander as
5 to financial disclosures.

6 THE COURT: Would there be any different concerns for
7 that defendant?

8 A WOMAN: No, Your Honor.

9 MR. HENDERSON: Thank you, Your Honor.

10 THE COURT: Then your me-too request is granted.

11 MR. HENDERSON: Thank you, Your Honor.

12 THE COURT: If there's nothing further, thank you all
13 for coming in this morning.

14 Again we have a specific date set in the future for
15 all parties to return back to this court. And again this
16 court's doors are open if there's something of an emergency
17 nature that needs to be addressed, since you don't have to wait
18 for that actual date; so please know that you're not cut off
19 from that opportunity.

20 If there's nothing further, thank you all for coming
21 in this morning.

22 MR. LORD: Thank you.

23 (At 10:44 a.m. proceedings were adjourned.)

24 --o0o--

25

1 I certify that the foregoing is a correct transcript
2 from the record of proceedings in the above-entitled matter.
3 This excludes any matters heard via telephone, in which case I
4 do not certify the speaker's identity or the content.

5
6 \s\ Laurene Kelly

7 This 3rd day of OCTOBER, 2008.
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